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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No.

MILTON M. FERRELL,

Petitioner,

vs.

HONORABLE CHARLES B. FULTON, as one of the Judges of the United States District Court for the Southern District of Florida,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit

---

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, MILTON M. FERRELL, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 9, 1967.

OPINIONS BELOW

No written opinion was delivered either in the Court of Appeals or in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1967 (infra Appendix A). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). The basis for jurisdiction in the Court of Appeals was 28 U.S.C. §1651. The basis of jurisdiction in the District Court was 26 U.S.C. §7201, 7206.

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The constitutional provision involved in this case is the Double Jeopardy clause of the Fifth Amendment to the Constitution of the United States as set forth hereinafter in Appendix B.

The federal rule involved is Rule 24 (c) of the Federal Rules of Criminal Procedure, as hereinafter set forth in Appendix C.

STATEMENT OF THE CASE

An indictment charging two counts of income tax evasion and two counts of filing false tax returns was filed against the petitioner in the United States District Court for the Southern District of Florida. The two counts alleging tax evasion were withdrawn on completion of the evidence. The case came on for trial on April 5, 1966.

A jury of twelve jurors was duly impaneled and sworn to try the case. Two alternate jurors were also selected, but one of these alternates was excused after opening statement by government counsel on April 5. On the following morning, April 6 (and prior to any testimony being received) the trial judge made the following statement (R-98)

> "THE COURT: Wait a minute. Hold the jury a minute. One of the jurors told me this morning that he went out to get some shoes in Hialeah, and he carried them out to get some money in his car and they arrested him for shoplifting.
>
> "So I just wanted to call that—think it over a little bit and see what we shall do with this juror.
>
> "MR. FOOSANER: Do you know which juror it is, your Honor.
>
> "THE COURT: I do, but I am not going to discuss it with you. Just think about it. He is upset, naturally."

Witnesses were then called and testimony taken. After the noon recess on April 6, 1966, government counsel suggested that the juror be excused and the Court stated (R-199):

> "THE COURT: I am going to excuse him later. I am contemplating excusing him unless the matter clears up. I think counsel is right, his capacity as a juror has been seriously questioned, let

us say, circumstances beyond his control, nevertheless existing."

However, no action was taken, and no interrogation of the juror was conducted in open court. The trial continued throughout April 6, April 7, and the morning of April 8, 1966. After the conference on the charges to be given the jury, the Court announced its intention to excuse the juror in question, the Court stating that it did not think the juror was qualified to sit on a criminal jury (R-578). The petitioner objected to the excusing of such juror, which objection was noted and overruled (R-581). However, the Court did not at that time excuse the juror, but proceeded to have final arguments and to charge the jury. After completing the charge to the jury, the Court stated (R-629, 630):

"THE COURT: . . . Juror No. 12, is your trouble still bothering you a little bit?

"THE JUROR: Yes, sir.

"THE COURT: I am going to excuse you at this time because I don't want you to have a double burden on your mind when you go in that jury room. . . .

"The alternate will take No. 12's place. Just change chairs. And, No. 12, you will be excused at this time.

"I will explain to the jury that No. 12 had a matter that was worrying him and harassing him and I thought it advisable to excuse him."

The jury, as thus newly constituted, retired and deliberated but was unable to arrive at a verdict. The Court declared a mistrial and dismissed the jury three days after it first retired to consider its verdict.

Thereafter, the petitioner filed in the District Court his Motion to Dismiss (Plea in Bar of Trial and Plea of former Jeopardy (R-727), which motion asserted that the action of the Court in discharging a juror without sufficient cause and against the objection of the petitioner after the jury was sworn and had heard all the evidence, arguments and charges of the Court is a bar to further prosecution and that any attempt to bring the petitioner to trial on the same charges or indictment would constitute double jeopardy and violated the rights of the petitioner under the Fifth Amendment to the Constitution of the United States.

On February 9, 1967, the Respondent, the Honorable Charles B. Fulton, District Judge, entered his Order (R-734) denying the petitioner's Motion to Dismiss. The case has been reset for trial on November 13, 1967 (R-735).

Thereafter, the petitioner filed his Petition for Writ of Mandamus and/or Prohibition (R-649-662) in the Court of Appeals, Fifth Circuit. In his Petition in the Court of Appeals, the petitioner presented the questions:

1. Whether the discharge prior to verdict of a juror who was neither unable nor disqualified from performing his duties, over the objection of a defendant, and the replacement of such juror with an alternate

juror constituted the discharge of the particular tribunal summoned to sit in judgment on the defendant.

2. Whether the Double Jeopardy Clause of the Fifth Amendment prohibits a second trial where in the first trial the trial judge, without an imperious necessity to do so, discharged the particular jury selected to sit in judgment on the defendant.

3. Whether the extraordinary remedy of Prohibition or Mandamus is proper to give effect to the constitutional immunity against being twice put in jeopardy as guaranteed by the Fifth Amendment.

On August 9, 1967 the Court of Appeals entered its judgment denying the petitioner's Petition for Writ of Mandamus and/or Prohibition (R-736). It does not appear from the judgment whether the Court of Appeals denied the petition on its merits or whether the Court of Appeals was of the opinion that prohibition or mandamus was not the appropriate remedy.

QUESTIONS PRESENTED

I.

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PROHIBITS A SECOND TRIAL WHERE PRIOR TO VERDICT IN THE FIRST TRIAL

THE TRIAL JUDGE, WITHOUT AN IMPERIOUS NECESSITY TO DO SO, DISCHARGED THE PARTICULAR JURY SELECTED TO SIT IN JUDGMENT ON THE DEFENDANT BY REPLACING A JUROR, WHO WAS NEITHER UNABLE NOR DISQUALIFIED TO PERFORM HIS DUTIES, WITH AN ALTERNATE JUROR.

II.

WHETHER THE EXTRAORDINARY REMEDY OF PROHIBITION OR MANDAMUS SHOULD BE GRANTED BY A COURT OF APPEALS IN ORDER TO MAKE EFFECTIVE THE CONSTITUTIONAL IMMUNITY AGAINST BEING TWICE PUT IN JEOPARDY, AS GUARANTEED BY THE FIFTH AMENDMENT.

REASONS FOR GRANTING THE WRIT

I.

The petition should be granted to consider important questions arising under the federal constitution which have not been, but should be, settled by this Court.

The prohibition of the double jeopardy clause of the Fifth Amendment is " . . . not against being twice punished; but against being twice put in jeopardy . . . " *United States v. Ball*, 163 U.S. 662, 669; *Downum v. United States*, 372 U.S. 734, 736. Where it affirmatively

appears that a defendant is being compelled to stand a second trial in violation of the provisions of the Fifth Amendment the extraordinary writ of prohibition or mandamus should be available to the defendant. However, this Court has never had the occasion to specifically rule upon the propriety of the issuance of an extraordinary writ by a court of appeals to prevent a second trial and thus to give effective force and meaning to the double jeopardy clause. If a defendant is compelled to stand a second trial and then seek review as to whether he should have been tried the second time, the constitutional prohibition of a second trial is meaningless. Thus, the question of whether the writ of prohibition or mandamus is available to implement the double jeopardy clause is an important question which has not, but should be, settled by this Court.

This Court has held that a court of appeals has full power to issue an extraordinary writ to a federal district court for the purpose of prohibiting the district court from taking action in excess of its jurisdictional power where an adequate remedy by appeal does not lie. *Ex Parte Republic of Peru*, 318 U.S. 578; *Roche v. Evaporated Milk Association*, 319 U.S. 21. A federal district court has no jurisdictional power to twice put a person in jeopardy. As previously noted, the prohibition of the double jeopardy clause is not against being twice punished but against being twice put in jeopardy. If a defendant is being held for a crime of which he has already been acquitted, the trial court is without power either to punish him again or to try him again for that offense. *Ex Parte Nielsen*, 131 U.S. 176; *Clawans v. Rives* (D.C. 1939) 104 F. 2d 240; *Bens v. U.S.* (2nd Circuit, 1920) 266 F. 152. For

state court cases recognizing that a trial court does not have jurisdiction or power to subject a defendant to a second trial where the defendant has already been in jeopardy, see annotation "Former Jeopardy as Ground for Prohibition", 94 A.L.R. 2d 1048. In particular, the petitioner urges this Court to consider the concise discussion of fundamental principles as set forth in *McCabe v. Bronx County Court*, 24 Misc. 2d 472, 199 N.Y.S. 2d 241, wherein it is stated:

> "The plea of double jeopardy is not a defense in the ordinary sense. For a defense such as alibi, self-defense, lack of intent, etc., is aimed at establishing the defendant's innocence of the crime charged and of necessity must be proffered at the trial; whereas the plea of double jeopardy (unless there was an actual acquittal upon a prior trial) . . . is an assertion of a constitutional grant of immunity. Therefore, it is more than a defense. The act which terminates the first trial germinates into life the dormant seed of constitutional immunity. . . . The guarantee is that the person shall not be subject to the risk of a second trial. Nor may this protection be abridged or curtailed by holding that a defendant may assert it during any stage of the new trial. The immunity protects him against being subjected to another trial — any part of another trial. There is jeopardy so long as the indictment with the same charge is outstanding and pending . . . Therefore, reason and logic indicate that it is permissible to raise the plea of double jeopardy, if a person chooses, before the

commencement of another trial and in whatever form is proper and available."

A right of appeal after a second trial (if found guilty) obviously does not afford the full measure of protection as guaranteed by the Fifth Amendment. Where a trial court overrules a motion to dismiss which affirmatively shows that a defendant is being twice put in jeopardy, the only manner in which a second trial can be prevented is by an extraordinary writ of prohibition or mandamus issued by a court of appeals. It has been recognized that a trial court is without jurisdiction or power to again try a defendant for an offense for which he has already been acquitted, and that such defendant is entitled to obtain his liberty through a writ of habeas corpus. *Clawans v. Rives* (D.C. 1939) 104 F. 2d 240; *Bens v. U.S.* (2nd Circuit, 1920) 266 F. 152. The writ of habeas corpus is available to a defendant in custody; to a defendant not in custody (such as the petitioner herein) the appropriate writ is prohibition or mandamus. The underlying legal basis is the same; the trial court being without jurisdiction or power to again try the defendant, he is entitled to immediate discharge, if in custody, and to immediate termination of any exercise of power by the trial court, whether he be in custody or not. The constitutional immunity from being subjected to double jeopardy must be protected and enforced at whatever stage of the proceedings it is established.

In *Camara v. Municipal Court of the City and County of San Francisco* ——U.S.——, decided June 5, 1967, this Court recognized the propriety of a writ of prohibition by a state court to give effect to the constitutional protection against arbitrary invasions of privacy by govern-

ment officers, as guaranteed by the Fourth Amendment. In this case prohibition should be granted to give effect to the constitutional protection against being subjected to a second trial, as guaranteed by the Fifth Amendment. Surely, the federal courts should grant as effective a remedy for enforcement of federal constitutional rights as is granted by the state courts.

II.

In denying the petition for writ of prohibition and/or mandamus, and thereby ruling that the discharge of the particular jury selected to sit in judgment on the petitioner, without an imperious necessity to do so, does not prohibit a second trial, the court of appeals decided such federal question in a way in conflict with the decision of this Court in *Downum v. U. S.*, 372 U.S. 734.

As hereinabove noted, the judgment of the court of appeals does not reflect whether the court of appeals predicated its denial of prohibition upon the merits of the case or upon its view that there was an adequate remedy by way of appeal. The appropriateness of an extraordinary writ has already been discussed. If the decision of the court of appeals was on the merits, then its decision conflicts with *Downum v. U. S.*, supra.

In the instant case, after the jury was sworn, one of the jurors was charged with petty larceny in violation of a municipal ordinance. The trial court permitted the juror to remain on the jury for three days of testimony, final argument and charge to the jury. The trial judge then excused the juror, over petitioner's objection, and

substituted an alternate. There was no showing of disqualification or inability of the juror to perform his duties. Petitioner contends that the unnecessary and improper discharge of such juror constituted a discharge of the particular tribunal selected to try petitioner without an imperious necessity to do so, and that a second trial of petitioner is prohibited by the Fifth Amendment and this Court's decision in *Downum v. United States*, supra.

Jeopardy attaches when a jury is selected and sworn. If such jury is discharged without reaching a verdict and without the defendant's consent, the defendant may not be tried again unless there was an imperious necessity for the discharge of the jury. *Downum v. U.S.*, 372 U.S. 734; *U.S. v. Perez*, 9 Wheat. 579; *Green v. United States*, 355 U.S. 184. In state cases, a second prosecution has been barred where the jury was discharged through the trial judge's misconstruction of the law. *Jackson v. Superior Court of San Diego County*, 10 Cal. 2d 350, 74 P. 2d 243; *State v. Spayde*, 110 Iowa 726, 80 N. W. 1058; *Lillard v. Commonwealth*, 267 S. W. 2d 712 (Ky.); *Yarborough v. State*, 90 Okla. Crim. 74, 210 P. 2d 375. A second prosecution has also been barred where the trial judge made a mistake in concluding that the jury was illegally impaneled, or biased. *Whitmore v. State*, 43 Ark. 271; *People v. Barker*, 145 Mich. 488, 108 N. W. 999; *Gillespie v. State*, 168 Ind. 298, 80 N. E. 829; *O'Brian v. Commonwealth*, 72 Ky. 333, 15 Am. Rep. 715.

No inflexible rule has been enunciated as to when a jury may be properly discharged prior to verdict. However, it is clear that such discharge may be exercised "only in very extraordinary and striking circumstances." *U.S. v. Coolidge* (CC Mass.) 2 Gall. 364, F. Cas. No.

14858; *Downum v. United States*, supra; *Cornero v. United States*, supra.

Defendant has the valued right to have his trial completed by the particular tribunal summoned to sit in judgment on him. *Downum v. U.S.*, supra. The particular tribunal consists of the twelve who are selected and sworn to try the case. The *Downum* case refers to the jury selected and sworn as a "tribunal". This tribunal may not be disturbed. The discharge of any one of the twelve jurors after the jury has been selected and sworn as effectively destroys the jury as does the discharge of the entire jury. See *Gillespie v. State*, 168 Ind. 298, 80 N.E. 829; *O'Brian v. Commonwealth*, 72 Ky. 333, 15 Am. Rep. 715; *Ward v. State*, 1 Humph. (Tenn.) 253; *Tomasson v. State*, 112 Tenn. 596, 79 S.W. 802. Thus, the discharge of any member of a jury, in the absence of an imperious necessity for so doing, constitutes a discharge of the entire jury and is equivalent to an acquittal of the accused and bars further proceedings against the accused.

In the instant case the trial judge took it upon himself to discharge juror 12 and to replace him with an alternate juror. Such action by the court was equivalent to a discharge of the particular tribunal selected to try the petitioner unless there was an imperious necessity for the discharge of juror 12. Rule 24 (c) of the Federal Rules of Criminal Procedure (Appendix C) provides for the replacement of jurors by alternate jurors only in the event a juror becomes unable or disqualified to perform his duties. Rule 24 (c) recognizes the requirements of the law that there must be an imperious necessity before there can be any discharge of the original jury selected, or any member thereof. The juror in question had been

arrested and charged with petty larceny under a city ordinance. This is no disqualification of a juror. Even if the juror had been accused of a felony, he would not be disqualified. Under 28 U.S.C.A. 1861 (Appendix D), a juror is not disqualified unless he has been *convicted* of a felony in a state or federal court. Nor was there any showing that the juror was unable to perform his duties. The trial judge was aware of the arrest of the juror prior to the commencement of testimony on April 6, 1966. However, the court took no action to discharge the juror until the afternoon of April 8 when the entire case had been completed and the jury charged. The only logical explanation of the trial judge's action in keeping the juror in question in service until the case was argued and the court had charged the jury is that the trial court was fearful one of the other eleven jurors might become unable to serve and if this occurred it appears the trial court may not have excused the juror in question because there was only one alternate. This is borne out by the Court's remarks (R 577-581) wherein the Court requested a stipulation from defense counsel to proceed with a verdict from a jury of less than twelve men (defendant's counsel did not so stipulate). After charging the jury, the court inquired of the juror, "Is your trouble still bothering you a *little bit?*" (emphasis added) To which he replied, "Yes, sir." The Court thereupon excused the juror, having noted and overruled the objection of petitioner. If the trial court had felt that the juror was unable to perform his duties, the Court would have determined such fact and excused the juror on April 6. Surely the trial court would not have permitted a juror who was unable to perform his duties to continue to sit on the jury for three full days. Obviously the Court did not consider the juror unable to perform his duties. It is in-

teresting to note that the trial court even refused to reveal the identity of the juror in question until the third day of trial. There was absolutely no showing whatsoever that the juror was unable to give his full attention to the case and to render an impartial verdict. In the absence of such a showing, the trial judge had no power to excuse the juror.

If a juror could be removed and an alternate substituted under the facts in the case at bar, then the trial court can remove a juror and substitute an alternate for any reason or no reason. Where would the line be drawn as to when the trial court could remove a juror? Certainly, under Rule 24 (c), Federal Rules of Criminal Procedure, there is no provision for such action. An alternate juror can only replace a juror when said juror becomes unable or disqualified to perform his duties.

When a court discharges a juror and substitutes an alternate, the court must do so for a reason which would justify the discharge of a jury when there were no alternates. Rule 24 (c) of the Federal Rules of Criminal Procedure does not enlarge the right of the trial court to remove an individual juror where there is no imperious necessity for such action any more than if there were no alternates and the result would be declaring a mistrial. Otherwise, Rule 24 (c) would violate the double jeopardy clause of the Fifth Amendment.

Downum v. U.S., supra, requires that the particular tribunal selected to try a defendant shall not be discharged prior to verdict unless there is an imperious necessity for doing so. There was no imperious necessity for the discharge of juror 12 in this case. There was no indi-

cation of disqualification or inability to perform his duties. The valued right of the petitioner to have his fate decided by juror No. 12 and his eleven compatriots cannot be frittered away by precipitous action by the trial court. We can only speculate as to what the veridct may have been if juror No. 12 had continued on the jury, but the petitioner had the right to have his fate decided by the twelve men selected and sworn, and the trial judge had no legal power to deprive him of this right.

III.

The petition should be granted to consider questions of importance in the administration of justice in the federal courts. These questions have not only general importance in the administration of justice but have a very immediate, current and concrete impact with respect to further proceedings, if any, in this case.

These questions concern, simply, the nature of the relief which the federal courts will grant to a defendant faced with a second trial in violation of the Fifth Amendment, and, secondly, the authority of a trial judge to substitute an alternate juror for a juror who is not shown to have become either disqualified or unable to perform his duties. Both of these questions have been discussed hereinabove in the context of a federal question which needs to be decided by this Court and in the context of the rulings below being at variance with the decisions of this Court. The discussion will not be repeated other than to point out that this Court has a responsibility beyond the strict mandates of the Constitution to fashion rules for the fair administration of federal criminal justice. *McNabb v. United States*, 318 U.S. 332. To deny a

defendant an extraordinary writ, to compel him to stand a second trial upon the reasoning that if convicted he may then have a determination by the appellate court as to whether he should have been tried the second time, is a patently unfair form of administration of justice. This Court should announce the rule to be that prohibition is the proper remedy available to a defendant faced with a second trial in violation of the Fifth Amendment.

Finally, for the guidance of the district courts this Court should announce the rule to be that in a federal criminal case an alternate may not be substituted for a juror, over objection of either party, unless it is first affirmatively proven in open court that the juror has become disqualified or unable to perform his duties as a juror.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Herbert A. Warren, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed to the Solicitor General, Department of Justice, Washington, D.C., this 5 day of September, 1967 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington, D.C.

I FURTHER CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was personally delivered to WILLIAM A. MEADOWS, JR., United States Attorney for the Southern District of Florida, Federal Building, Miami, Florida, this 5 day of September, 1967.

Herbert A. Warren, Jr.

HERBERT A. WARREN, JR.
Of Counsel for Petitioner

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS

Fifth Circuit

No. 25,080

MILTON M. FERRELL,

Petitioner,

vs.

HONORABLE CHARLES B. FULTON,
as one of the Judges of the United States District Court
for the Southern District of Florida,

Respondent.

On Petition for Writ of Prohibition and/or Mandamus

Before WISDOM, GOLDBERG and DYER, Circuit Judges

BY THE COURT:

The petition of Milton M. Ferrell for Writ of Prohibition and/or Mandamus to prohibit the respondent, the Honorable Charles B. Fulton, as one of the judges of the United States District Court for the Southern District of Florida, from subjecting the petitioner to a second trial and to order respondent to discharge the petitioner and dismiss the pending charges against the petitioner, is hereby denied.

APPENDIX B

AMENDMENT 5. CONSTITUTION OF THE UNITED STATES

"No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb; . . . "

APPENDIX C

RULE 24 (c). FEDERAL RULES OF CRIMINAL PROCEDURE

"Alternate Jurors. The Court may direct that not more than 4 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. . . . "

APPENDIX D

TITLE 28, SECTION 1861. UNITED STATES CODE ANNOTATED

"Qualifications of Federal jurors. Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless.—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 579

MILTON M. FERRELL, PETITIONER

v.

HONORABLE CHARLES B. FULTON, As One of the Judges of the United States District Court for the Southern District of Florida

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 5, 1966, a jury including two alternate jurors was sworn (R. 7)[1] to try petitioner on two counts of violating 26 U.S.C. 7206(1) by subscribing false tax returns for 1959 and 1960 (R. 1-6). On April 6, 1966, the trial court informed counsel that a juror, whose identity the court then declined to re-

[1] "R." refers to petitioner's appendix in the court of appeals.

veal, had reported to the court that, after the jury was impanelled (R. 11), he was arrested for shoplifting and was to have a preliminary hearing (R. 13). The court informed counsel that the juror was "upset" and that they should reflect on what should be done (R. 8). The court advised counsel that he was "contemplating excusing" the juror "unless this thing clears up very quickly," because "his capacity as a juror has been seriously questioned [by], let us say, circumstances beyond his control, nevertheless existing" (R. 10). On April 8, 1966, prior to summations, the court offered counsel the opportunity to make inquiries of the juror (R. 11-12). Petitioner's counsel took the position that no cause appeared to excuse this juror even "Assuming it is precisely as the Court has heretofore stated * * *" (R. 13). After the charge, the juror answered "Yes" when the trial judge asked in open court, "is your trouble still bothering you a little bit?" The judge then excused him because he "had a matter that was worrying him and harassing him * * *" (R. 15-16). An alternate juror was substituted. The jury was unable to agree on a verdict, and was discharged (R. 16-17).

A subsequent motion by petitioner to dismiss the indictment on the ground he had been placed in jeopardy and could not be retried was denied (R. 27). The court of appeals denied his application for a writ of prohibition or mandamus to bar a retrial (Pet. App. 1).

The double jeopardy clause does not bar a retrial of petitioner. There is no conflict or other cause for review in this Court.

The trial court acted with propriety and good judgment in discharging the juror. This juror was sufficiently disturbed by being arrested on a shoplifting charge to approach the court. The court did not act hastily, but deferred action in hopes that the juror's difficulty would clear up, as, perhaps, by the local prosecuting authorities accepting the juror's explanation to the trial court that he had left a store with merchandise momentarily to get some money out of his automobile (R. 7). However, the filing of a formal charge [2] and the juror's acknowledgement that he was upset justified the trial court in its view that the incident had seriously affected the juror's capacity to serve.

The trial court's action was not, as petitioner argues (Pet. 14), inconsistent with the statutory qualifications for jurors set in 28 U.S.C. 1861. The trial court's remark that this juror was "hardly qualified to sit on a criminal jury" in the circumstances (R. 11) was directed at the juror's capacity to function, as seen in the court's statement that "his capacity as a juror has been seriously questioned" (R. 10). This is certainly in accord with 28 U.S.C. 1861(3), which disqualifies from jury duty a person who "is incapable by reason of mental * * * infirmities to render efficient jury service."

This is not a case such as *Downum* v. *United States*, 372 U.S. 734, where the trial judge granted a

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[2] Petitioner's motion to dismiss the indictment alleged that the juror was subsequently formally charged with violation of a municipal ordinance (R. 20).

mistrial after the jury was sworn because the prosecutor had neglected to procure the attendance of all his witnesses. This Court recognized in *Downum* (p. 736) that a trial court has some "discretion to discharge the jury before it has reached a verdict," albeit a discretion that may be exercised "'only in very extraordinary and striking circumstances'." One frequently given example was described in *Wade* v. *Hunter*, 336 U.S. 684, 689:

> And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial. * * *

See *United States* v. *Cimino*, 224 F. 2d 274 (C.A. 2). If a mistrial may be declared, the less drastic action of substituting an alternate juror should be equally permissible. Doubt of a juror's mental capacity to continue should be as allowable a ground for substitution as the appearance of prejudice.

The paucity of decided cases canvassing the practice of substituting alternate jurors during trial is doubtless due to a general recognition that such a use of the alternate juror procedure is not an encroachment on the right to jury trial. We are aware of only one analogous case in the federal courts of appeals. That is *Houlihan* v. *United States*, 332 F. 2d 8, 12, certiorari denied, 379 U.S. 828, where the Second Circuit sustained against an attack founded on the Due Process Clause the action of a trial

court that excused, without consultation with counsel, a nurse whose patient suffered a heart attack during the trial. See, also, *People* v. *Hess*, 104 Cal. App. 2d 642, 678-687, 234 P. 2d 65, 89, appeal dismissed, 342 U.S. 880 (juror's father suffered stroke).

This is not to say, as petitioner asserts (Pet. 15), that approval of what the trial judge did here would mean that no line can "be drawn as to when the trial court can remove a juror." Certainly the power to substitute an alternate during trial is no different from the power to excuse a member of the venire for cause. Cf. *People* v. *Hamilton*, 60 Cal. 2d 105, 126, 383 P. 2d 412, 424.

But, apart from such limitations, a defendant enjoys the full substance of his constitutional right to jury trial if he is judged, as was petitioner, by twelve of the combined primary and alternate jurors. This was the holding in *People* v. *Peete*, 54 Cal. App. 333, 202 Pac. 51, and it was the *Peete* case that was primarily relied on for precedent in the legislative reports preceding the Act of June 29, 1932, c. 309, 47 Stat. 380, that first provided for alternate jurors in federal jury trials. S. Rep. 866 and H. Rep. 957, 72d Cong., 1st Sess. This statute was held constitutional in *Robinson* v. *United States*, 144 F. 2d 392 (C.A. 6), affirmed on other grounds, 324 U.S. 282. See also, *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 117 (C.A. 6), affirmed, 328 U.S. 781. Other state cases in accord with the *Peete* case are *People* v. *Mitchell*, 266 N.Y. 15, 18, 193 N.E. 445-446 *State* v. *Dalton*, 206 N.C. 507, 512-513, 174

S.E. 422, 424-425; *Commonwealth* v. *Fugmann*, 330 Pa. 4, 29, 198 Atl. 99, 111-112; *State* v. *Dolbow*, 117 N.J.L. 560, 567, 189 Atl. 915, 918-919, appeal dismissed, 301 U.S. 669, (upholding procedure of drawing ultimate jurors from the sworn panel *after* the case is tried); *Commonwealth* v. *Bellino*, 320 Mass. 635, 71 N.E. 2d 411, 415, certiorari denied, 330 U.S. 832 (same).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 579

MILTON M. FERRELL,

Petitioner,

vs.

HONORABLE CHARLES B. FULTON, as one of the judges of the United States District Court for the Southern District of Florida,

Respondent.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The respondent sets forth in his brief (page 2) that the juror in question "was to have a preliminary hearing." This is not factually correct. The court did state (R-13):*

> "See, the juror, after he was in the box and after the case started, is arrested for an alleged shoplifting, apparently, and his case is set down for hearing, **I think he said to us.** That is, the preliminary hearing."

Thus, the court itself was uncertain as to whether

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*"R" refers to petitioner's appendix in the court of appeals.

or not the juror had stated that he was to have any preliminary hearing.

The respondent states, on page 4 of his brief, "Doubt of a juror's mental capacity to continue should be as allowable a ground for substitution as the appearance of prejudice." There was never any question of the juror's mental capacity to continue. In fact, the trial court allowed the juror to continue to sit throughout the trial from its commencement through the charge to the jury. The court announced to the jury that juror #12 "had a matter that was worrying him and harassing him", but this was never established by any testimony or statement by the juror himself other than the answer "yes, sir" when the trial judge asked him, "Is your trouble still bothering you a little bit?" (R-15) The two words "yes, sir" was the only utterance made by the juror in open court, all else was mere conjecture by the court, based on what, we do not know. Even if it be assumed that a juror might be worried about some personal matter, such fact falls far short of establishing that the juror is "incapable by reason of mental . . . infirmities to render efficient jury service." Further, it should be noted that the trial court had its doubts as to whether the arrest had even adversely affected the juror. The court stated (R 13-14):

> "Under the circumstances, I don't think he is qualified to sit on a criminal jury because he naturally is going to be affected by it one way or the other. I don't know. Maybe he is a strong man, and this makes him all the stronger."

Thus, the trial court itself had no knowledge and had made no determination as to whether the juror was

adversely affected by the arrest and, certainly, there was never any determination made that the juror was mentally incapable to serve. In fact, the prosecutor made no such contention at the time of trial, but only mentioned the **possibility** that the juror could have been badly treated by the police (R-9). Such supposition was totally without support.

> The respondent states on page 4 of its brief:
> "If a mistrial may be declared, the less drastic action of substituting an alternate juror should be equally permissible."

Petitioner contends that the substitution of a juror with an alternate is no less drastic than declaring a mistrial. A defendant has the valued right to have his trial completed by the particular tribunal summoned to sit in judgment on him. Any interference by the court with that right, whether by declaring a mistrial or by substituting an alternate, must be only in situations of "very extraordinary and striking circumstances." See **Downum v. United States,** 372 U.S. 734

Rule 24 (C) of the Federal Rules of Criminal Procedure recognizes this requirement of the law by providing for the replacement of jurors by alternates only in the event a juror becomes unable or disqualified to perform his duties. The validity of discharging a juror without the consent of a defendant must be determined by the same rules as applied to determining the validity of declaring a mistrial. Nothing was shown in the instant case to establish any inability or disqualification on the part of juror #12 other than the mere fact that he had been arrested for violating a municipal ordinance. This does

not disqualify or render a juror unable to serve. In fact, the violation of a municipal ordinance is not even a misdemeanor under Florida law. See **Roe v. State,** 119 So. 118; **Wendrick v. Strazzula,** Fla. 135 So.2d 1

The respondent cites **Houlihan v. U. S.,** 332 F.2d 8, 12, as being analogous to the instant case. However, in **Houlihan,** the Second Circuit stated:

> "Defendants do not argue that the decision to dismiss the juror was itself erroneous."

The contention in **Houlihan** was solely that the action of the court in excusing the juror should have been taken in open court. Petitioner in the instant case vigorously contends, as he did in the trial court, that the decision of the trial court to discharge juror #12 was definitely erroneous. **Houlihan** is not analogous.

The respondent states (page 5)

> "Certainly the power to substitute an alternate during trial is no different from the power to excuse a member of the venire for cause. Cf. People v. Hamilton, 60 Cal. 2d 105, 126, 383 P. 2d 412, 424."

This is not a correct statement of the law, and the case cited does not so hold. There is considerable discretion vested in the trial judge to excuse a member of the venire for cause, and neither side can complain. But once the tribunal of twelve has been accepted by the defendant to be the determinors of his fate, and such tribunal has been sworn, the defendant then has the valued right

to have his fate decided by that particular tribunal. Nothing short of very extraordinary and striking circumstances can be the basis for discharging or alternating that tribunal.

In support of the statement that the power to substitute an alternate during trial is no different from the power to excuse a member of the venire for cause, the respondent cites **People v. Hamilton,** 60 Cal. 2d 105, 126, 383 P. 2d 412, 424. Such decision does not support respondent's contention. In that case the trial judge, during the penalty phase of a murder trial, substituted an alternate for a juror who had read the Penal Code but who assured the court she would accept the law as given by the court. The California Supreme Court ruled that the dismissal of such juror was reversible error. The California Supreme Court pointed out that Section 1089 of the Penal Code set forth four distinct grounds for discharging a juror and substituting an alternate, none of which were shown to exist in the case. With respect to the code provisions the court stated, on page 424:

> " . . . the entire history indicates a definite unwillingness on the part of the Legislature to either adopt a practice of unrestricted substitution of jurors or to authorize a wide discretion in the trial court beyond that required to apply the facts shown to any one of the four causes for substitution which are set forth in the statute.
>
> . . .
>
> " . . . There was no basis at all for the trial

court's determination that Mrs. McCullough was guilty of misconduct, or was unable to perform her duties. Thus the dismissal of this juror was error and in violation of the restrictions imposed by section 1089 of the Penal Code. All of the cases cited above clearly indicate that this is so. . . . "

Likewise, in the instant case, Rule 24(c) (which is even more restrictive than the California code provision) limits substitution to cases where a juror becomes disqualified or unable to perform his duties. The trial court did not determine that juror #12 was either disqualified or unable to perform his duties. Nor was there any basis upon which a finding of disqualification or inability to serve could have been predicated. The petitioner was placed in jeopardy; the tribunal selected to try him was discharged by the discharge of juror #12; the petitioner may not be required to run the gauntlet of another trial. If a juror may be substituted under the circumstances here presented, it would be possible for a judge to "load" the jury (see **People v. Hamilton,** supra) in favor of one side or the other based solely on the conclusions of the judge derived from private conversations with jurors. If there were four alternates the judge could replace 1/3 of the jury based solely on his private determinations.

The views expressed by the Department of Justice in its brief on behalf of respondent are so drastically opposed to those of petitioner as to illustrate the need for a definitive statement by this court, for the guidance of the district courts, as to when a juror may be properly replaced by an alternate.

Finally, it is to be noted that the respondent does not question the contentions of the petitioner that prohibition or mandamus is the appropriate remedy.

The petition for certiorari should be granted for the reasons set forth in the petition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner was mailed to the Solicitor General, Department of Justice, Washington, D. C. this _____ day of October, 1967, by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington, D. C.

I FURTHER CERTIFY that a copy of the foregoing Reply Brief of Petitioner was personally delivered to WILLIAM A. MEADOWS, JR., United States Attorney for the Southern District of Florida, Federal Building, Miami, Florida, this _____ day of October, 1967.

HERBERT A. WARREN, JR.
Of Counsel for Petitioner